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Cases Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. 1271.

THE SEVEN UP COMPANY,
Petitioner,

v.

CHEER UP SALES COMPANY OF ST. LOUIS, MISSOURI, a Corporation, AMERICAN SODA WATER COMPANY, a Corporation, and ORANGE SMILE SIRUP COMPANY, a Corporation,
Respondents.

PETITIONER'S REPLY BRIEF.

A single question is involved in the petition, and a single reason relied on for granting the writ. That question is (to repeat), "What amounts to a sufficient showing to move an appellate court to grant leave to file a bill of review in the trial court?" The single reason relied on for granting the writ is a conflict of decisions. Any discussion in respondents' brief not directed to this single point and to this single ground will be ignored here.

Respondents, under their point I, assert there is no conflict. In support of this assertion we find in the argument under its corresponding heading I a statement, wholly unsupported and unexplained, that the "Eighth Circuit Court of Appeals would have found the same result had it used the *obiter dictum* of the Sixth Circuit." Under point III and supporting argument respondents again assert that the rule of the Sixth Circuit, taken from *Egry Register Co. v. Standard Register Co.*, 1 F. 2d 11, 12, is *obiter dictum.* This constitutes respondents' defense to the petition, omitting irrelevant discussion of ancillary matters. An examination will reveal these assertions, or purported defenses, are without substance.

Egry Register Co. v. Standard Register Co., 1 F. 2d 11, 12.

The rule stated in that case is as follows:

> "The rule is that, whenever the right to file a bill is at all doubtful, leave is granted as a matter of course. This does not necessarily involve any consideration whatever as to the sufficiency of the bill, but only as to the apparent right of the plaintiff to file the same."

Is that statement *obiter dictum?* A consideration of the point was necessary for a decision on the matter before the court. True, the court had already granted leave to file the bill, but it was necessary to determine the effect of the order granting the leave. The court thereupon announced the rule under which it had acted and was acting in the matter instantly before it. Hence, it was not *obiter dictum* but an announcement of a rule under which the court had acted, was then presently proceeding, and as the established rule and practice of the court.

Respondents do not deny that the Third Circuit has adopted and proceeded according to that rule (Respondents' Brief, pp. 6-7).

Reasonable Probability Rule, First, Fourth, Fifth, Seventh and Ninth Circuits and D. of C.

Respondents seem to wholly ignore the reasonable probability rule applicable in the indicated jurisdictions. That is, unless the reference to "Tweedle Dee" and "Tweedle Dum" (Respondents' Brief, p. 15) is intended as a defense.

It can hardly be contended that the requirement on the one hand for a showing such as would "probably" induce a conclusion, and on the other hand the requirement for a clear demonstration beyond a reasonable doubt, exhibit only colorable differences.

Eighth Circuit Decision.

An examination of the decision by the Eighth Circuit now before this court will show that it clearly announced the rule of law under which it was undertaking to decide the case. That is the rule which is cited as the basis for this petition.

It cannot be inferred that the court applied any other rule, because it did not; and there is no ground for the speculation that the same results would have been obtained by applying a substantially different rule. In fact, the petition (pp. 5-6) demonstrates in connection with the findings and subordinate conclusions of the court that the decision could only have been made by application of the rule announced and applied by the court.

Discretion.

In point II and the discussion thereunder, respondents refer to the discretion that is imposed in a court in such a matter. But judicial discretion is to be exercised under

and in obedience to established rules and practices, not a discretion by a court to formulate its own rules, nor to formulate a rule to fit each individual case as presented, nor a discretion to adopt and apply a rule at variance with applicable substantive law and correct procedural rules.

In *Osborn v. U. S. Bank*, 22 U. S. (9 Wheat.) 738, 866, it is said:

> "Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature, or, in other words, to the will of the law."

Conclusion.

In view of the clear demonstration of a conflict of decisions, the allowance of the writ is solicited.

Respectfully submitted,

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